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Supreme Court of the United States

OCTOBER TERM, 1925.

No. [redacted] 32

LUCKENBACH STEAMSHIP COMPANY, INC., *Appellant*,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF OF APPELLANT

PETER S. CARTER,
15 Whitehall Street.

C. C. DANIELS,
36 West 44th Street,
New York City.
Attorneys for Appellant.

Pandick Press, Inc., 22 Thames St., New York, U. S. A.

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IN THE

Supreme Court of the United States

OCTOBER TERM—1925.

No. 207.

LUCKENBACH STEAMSHIP COMPANY, INC.,
Appellant,

vs.

THE UNITED STATES.

BRIEF OF APPELLANT.

Nature of the Appeal.

This is an appeal from judgment of the Court of Claims entered April 28, 1924; from order overruling Motion for a New Trial and for Additional and Amended Findings of Fact; from order overruling motion to incorporate in the record on appeal Motion for New Trial and Motion for Amended and Additional Findings of Fact (R., 11).

Statement.

1. The Appellant, Luckenbach Steamship Company, Inc., operated for years prior and up to August 3, 1917, a fleet consisting of five tugs and twelve barges, of the market value of $5,279,500 at the time taken by defendant (R., 3-5).

2. Pursuant to the provisions of the Act of Congress of June 15th, 1917, (Chap. 29, 40 U. S. Stat. 182) defendant

commandeered on August 3rd, 1917, the entire fleet of Appellant, consisting of five tugs and twelve barges and took possession of the five tugs on October 12th and of the twelve barges on October 18th, 1917 (R., 7).

3. Surveys of said tugs and barges were made before they were commandeered and taken by representatives of defendant especially assigned for that purpose and report made giving detailed description of their construction and condition and expressing opinion as to value. After the tugs and barges were taken, surveys were made for the purpose of ascertaining their then conditions and reports were made showing that they were substantially in the same condition as at the time surveys were previously made.

4. The surveys were made by representatives of defendant and, however competent they may be to survey and determine the construction and condition of the tugs and barges, not one of them was competent to testify as to market value.

5. The men assigned by defendant to make the surveys reported $1,065,000 as their judgment of the value of the tugs and barges.

6. The surveys were turned over to the Board of Appraisal and furnished the only basis upon which the Board of Appraisal fixed the value of the property taken.

7. No member of the Board of Appraisal inspected said tugs and barges or had personal knowledge of their construction or condition at the time taken, nor did either of the members have knowledge of the market value of tugs and barges at that time, nor was either of them qualified to determine market value.

8. Notwithstanding the fact that the finding of the Board of Appraisal was based solely on the surveys, the value of the separate tugs and barges differs radically as shown in the surveys and value found by the Board of Appraisal, there being a difference of $174,455 in the value of one tug and a difference of $335,000 in the value of the fleet between the value shown in the surveys and that found by the Board of Appraisal.

9. The value of the tugs and barges fixed by the Board of Appraisal was based solely on the surveys and the amount thereof fixed by them and accepted by the President and the Court of Claims as "just compensation."

10. Appellant was not satisfied with the amount of compensation adjudged; refused to accept that amount as in full of "just compensation"; received payment of 75% thereof and on December 7th, 1917, executed bill of sale, and thereafter brought this action to recover the "just compensation" guaranteed by the constitution.

11. There was no tender or offer to pay the amount adjudged as "just compensation" *at the time adjudged*, nor tender or offer to pay the amount fixed as the value at the time taken *with interest*.

12. Evidence was taken in different parts of the United States. Appellant made numerous objections to evidence offered by defendant; which objections were noted in the record, but were never considered or passed on by the Court.

13. Appellant objected to printing certain portions of the evidence taken, but the Court refused to consider or pass on its objection and included in the printed record so

called evidence that no Court could consider and accept—going to the extent of including in the record the evidence of one witness that appellant was expressly denied the right to cross examine.

14. The only competent evidence before the Court of Claims of the character and condition of the tugs and barges at the time they were taken is contained in the surveys made by defendant and introduced in evidence by appellant.

15. The only competent evidence before the Court of Claims upon which opinion or expert evidence could be heard, is the surveys made by the defendant and put in evidence by appellant.

16. The only witnesses who gave expert or opinion evidence based solely on the tugs and barges as shown by the official surveys made by defendant were the nine witnesses offered by appellant.

17. The "market value" is the basis upon which compensation must be determined. Evidence was offered by appellant, but ignored by the Court, of the cost of reproducing the tugs and barges at the time they were taken and that of their earning power at that period, as throwing light on market value.

18. The only competent evidence before the Court of Claims of the market value of the tugs and barges at the time they were taken is that of the *nine* expert witnesses who testified on the assumption that the tugs and barges were of the construction and condition as set forth in the surveys made by defendant, that they were of the aggregate value of more than four million dollars; the value as

testified to by the nine expert witnesses being respectively $4,268,000; $4,784,500; $4,582,300; $4,224,100; $4,983,250; $6,014,920; $4,806,300; $4,650,000; $4,650,000. The average being $4,773,707.

19. The Court of Claims clearly states that its judgment is not based on the evidence in the record. The Court specifically states that

> "much of the evidence submitted is wholly irrelevant and does not concern the value of the tugs and barges at the time they were taken; the expert evidence is vague and indefinite, and is largely, if not altogether, speculative and conjectural (R., 10).

The Conclusion of the Court as to the value of the tugs and barges is unequivocally stated to be based on the "value placed upon the tugs and barges of the plaintiff by the Board of Appraisal"—and does not purport to be based on the evidence.

20. The judgment makes no provision for the payment of interest or any sum in lieu thereof, notwithstanding the law as construed by this Court makes it clear that when the United States condemns and takes property the owner is not limited to the value of the property at the time of the taking but is also entitled to such additional sum as will produce the full equivalent of that value paid *contemporaneously with the taking* and interest at the legal rate is declared to be a just measure by which to ascertain the amount so to be added.

21. After the Court of Claims rendered judgment, appellant made and filed with the Court of Claims motions which were disposed of as follows:

"(a) On June 26, 1924, motion for New Trial and Motion for Additional and Amended Findings of Fact and Conclusions of Law (Exhibit A), which was by the court overruled, and Claimant's application for appeal allowed on October 20th, 1924 (p. 11).

(b) On November 3rd, 1924, motion to incorporate in the record on appeal claimant's motion for New Trial and motion for Additional and Amended Findings of Fact and Conclusions of Law, which was by the court overruled on November 15th, 1924, and the clerk was 'directed in making up the record to *comply with the rule in the Supreme Court*' (p. 11).

(c) On November 13th, 1924, notice of, and motion for, Appeal to the Supreme Court of the United States from the order of Court of Claims of October 20th, 1924, denying and overruling motion for New Trial and Additional and Amended Findings of Fact and Conclusions of Law was made, and appeal from final order was allowed on November 15th, 1924 (p. 11).

(d) On November 17th, 1924, appeal herein as prepared by the clerk of the Court of Claims was filed in the court, in which reference is made to Claimant's motion for New Trial and for Additional and Amended Findings of Fact and Conclusions of Law (Exhibit A), but the same and the papers on which based are omitted from the record, and the clerk of the Court of Claims refused on demand to embrace the same in the record.

(e) On December 1st, 1924, Claimant moved in open court, 'To direct the clerk of this court to amend and supplement the record now on file herein in the Supreme Court, so as to embrace therein as

a part of the record the Claimant's motion for a New Trial and motion to find Additional and Amended Findings of Fact and Conclusions of Law and the papers on which the same was made.'

Or in the alternative:

To direct the clerk of this court to prepare and deliver to Claimant to be filed in the United States Supreme Court a record of case on appeal by Claimant, Luckenbach Steamship Company, Inc., from the final order of the court made October 20th, 1924, denying and overruling motion of Claimant for a New Trial and motion to find Additional and Amended Findings of Fact and Conclusions of Law, and to embody therein the motions as filed and the papers on which the same were made."

Motion was by the court overruled on December 2nd, 1924.

22. Appeal as prepared and certified by the Clerk of the Court of Claims was filed in this Court on November 18th, 1924, the same being in such form as to withhold and conceal from this Court the facts necessary for intelligent consideration of the facts and the law involved herein. In practical effect trial in the Court of Claims is reduced to a nullity and the production of evidence made superfluous and a waste of the time of court and counsel.

23. Appellant filed in this Court on April 20th, 1925 "Motion to Remand with Directions" with accompanying brief. This motion was on April 27th, 1925 continued by order of this Court to be heard and determined on hearing of the appeal herein, and is asked to be considered a part hereof, and that the brief filed with said motion be treated as a part of this brief.

Errors Assigned.

Appellant states that the Findings of Fact, Conclusions of Law and the Judgment by the Court of Claims were erroneous, and assigns the following errors—

1. The Court erred in rendering a judgment supported by no competent evidence which confiscates appellants' property and deprives it of the "just compensation" guaranteed by the Constitution.

2. The Court erred in determining the amount of "just compensation", in failing and refusing to allow interest or an amount equal to interest from the time of taking until paid.

3. The Court erred in denying Appellants' Motion for New Trial and Motion for Additional Findings of Fact and Conclusions of Law.

4. The Court erred in refusing to embrace in and make a part of the record on appeal, Appellant's Motion for New Trial and Motion for Additional Findings of Fact and Conclusions of Law and the papers upon which the same are based.

5. The Court erred in holding that the record on Appeal herein is made in compliance with the rules of the Supreme Court, for that there is no rule of this court which prevents the Court of Claims from certifying a record which contains copy of motions made from the denial of which appeal was taken.

6. The Court erred in that the Motion for New Trial is not permitted to be made a part of the record on appeal.

7. The Court erred in finding that "The Board of Appraisal made an exhaustive examination of these tugs and barges at the time, or just before the time, they were taken, and the valuation arrived at by the Board is fair and liberal."

Whereas, the Board of Appraisal made no examination of the tugs and barges; not a member saw or inspected any of them, but based their findings entirely on the surveys made by men assigned by the Navy to make the surveys; the value found shown by the surveys and that found by the Board of Appraisal differ $174,455 in the value of one tug and $335,000 in the fleet.

8. The Court erred in that it refused to apply amendment V of the Constitution of the United States and adjudge "just compensation" for the property taken.

9. The Court erred in that it deprived appellant of "due process of law" in that, among other things, the Court

(a) Based its judgment on the findings of the Board of Appraisal and not on the evidence;

(b) Refused to act on objections to evidence made by appellant;

(c) Refused to exclude incompetent and irrelevant evidence;

(d) Overruled motion for New Trial and Motion for Additional Facts and Conclusions of Law;

(e) Overruled motion to incorporate in the record on appeal Motion for New Trial and Motion for Additional Facts and Conclusions of Law;

(f) Overruled motion to make the record on appeal speak the truth and embody in the record Mo-

tion for New Trial and Motion for Additional Facts and Conclusions of Law.

10. The Court erred in holding that its determination of "just compensation" adjudged was based "upon a careful consideration of all the evidence in the case."

11. The Court erred in its characterization and description of the evidence upon which its opinion is alleged to have been based:

> "Much of the evidence submitted is wholly irrelevant and does not concern the value of the tugs and barges at the time they were taken" (R. 10).

In that it failed to limit its characterization of the evidence to that offered by defendant, and in not limiting its description of the expert evidence to that offered by defendant. So limited, its finding is correct, to wit, defendant's

> "expert evidence is vague and indefinite, and is largely, if not altogether, speculative and conjectural" (R. 10).

12. The Court erred in that it refused to render judgment based only on the competent evidence and in overruling the well settled law that those seeking relief must assume the burden of proof by competent evidence, and if the party upon whom the burden rests fails in that respect he must fail.

13. The Court erred in that it overruled without consideration appellant's objection to printing and making a part of the record certain incompetent evidence offered by defendant and printed and erroneously made a part of the record.

14. The Court erred in that it refused to examine, pass on or exclude incompetent evidence offered by defendant which was objected to by appellant (the same being designated in "Motion to Remand with Directions" and exhibit thereto attached and before the Court on this appeal).

15. The Court erred in Finding of Fact II in that the facts are put in such relation to each other, and relevant facts so carefully excluded, as to convey an impression contrary to the evidence and necessarily misleading.

16. The Court erred in failing to find in lieu of Finding of Fact II the Findings of Fact requested by appellant (shown in exhibit to Motion to Remand, beginning on p. 1) which states facts proven by the competent evidence.

POINT I.

"Just compensation" requires not only payment of the market value of the property at time of taking but interest thereon until paid.

The amount found by the Board of Appraisal as the market value of the five tugs and twelve barges at the time they were taken in 1917, was accepted and fixed by the President as the "just compensation" to which appellant was entitled, and the Court of Claims adjudges that payment of 75% of same several months thereafter, and payment more than six years thereafter of the portion of that amount not heretofore paid, complies with the constitutional requirement of making "just compensation".

The owner is entitled to be compensated for what is taken from him, and the compensation must be "a full and perfect equivalent for the property taken" (*Hudson Navigation Co.* vs. *U. S. Ct. Cls.* June 12, 1922).

Until the cases of *Seaboard Air Line Railway* vs. *U. S.* (261 U. S. 299) and *City of New York* vs. *U. S.* (261 U. S. 200) and the cases therein cited are repudiated and overruled by this court, the law is settled that the owner of property taken for public use is entitled to be paid the market value of the property taken at the time of taking and payment of a sum in addition thereto which will give the full equivalent as if the market value had been paid at the time of taking.

The Seaboard case (261 U. S. 299) is one in which the land of the plaintiff was condemned and taken by the United States for public use under the provisions of the Lever Act. The Board of Appraisal found the market value at the time of taking to be $235.80 and the President, following the usual custom, *pro forma*, declared the owner entitled to that amount as "just compensation."

Not satisfied, the Seaboard sought redress in the United States District Court, and a jury found that the property at the time of taking was of the market value of $6,000, and judgment was rendered for that amount with interest.

From this judgment the defendant appealed on the ground that interest could not be allowed. The Circuit Court of Appeals sustained defendant's contention and eliminated the interest.

From this judgment the Seaboard appealed to the United States Supreme Court and the judgment of the Circuit Court was reversed, interest allowed, in an opinion by a unanimous court. This opinion makes it clear that

interest on market values is part of the payment necessary to comply with the constitutional requirement of making "just compensation."

In the Seaboard case the value of the land taken as found by the Board of Appraisal was less than one-fifth of its market value as found by the jury.

The Seaboard could go into a court, however, where the rules of evidence are applied and save its property from being arbitrarily "confiscated" and secure a record on appeal in which the facts were not concealed.

The Seaboard was in a very different position from that in which appellant finds itself in the case at bar.

In the case at bar, appellant must submit to having its property "confiscated"—unless this court will look beyond the mere form of the judgment of the Court of Claims and correct the injustice done by reason of the failure of the Court of Claims to find the facts and apply the law by which the Supreme Court has declared the Court of Claims must be governed (*Globe Works* vs. *U. S.*, 53 Ct. Cls. 532).

In the case at bar the value of the property taken was found at a ridiculously low value—as in the Seaboard case. As is usual, however, the President fixed the amount so found as the "just compensation" to which the owner was entitled without interest, no matter when paid.

The Court of Claims "rubber stamped" the finding and rendered judgment for the unpaid balance of 25% of the amount so found without interest—thereby judicially making delay profitable to the Government and penalizing diligence.

If the Seaboard case had been tried in the Court of Claims and the rules of evidence and the decisions of this

court disregarded as they were in the case at bar, the Seaboard would have received $235.80, years after its property of the value of $6,000 had been taken by the United States under its sovereign power—and the facts would have been so concealed in the record on appeal under the shield of technical rules that the Appellate Court would never have been permitted to know the facts.

In the Seaboard case the opinion of the undivided court rendered by Mr. Justice Butler says:

> "Section 10 of the Lever Act authorized the taking of property for the public use on payment of just compensation. There is no provision in respect of interest. Just compensation is provided for by the Constitution, and the right to it cannot be taken away by statute. The compensation to which the owner is entitled is the full and perfect equivalent of the property taken. It rests on equitable principles and it means substantially that the owner shall be put in as good a position pecuniarily as he would have been if his property had not been taken. The United States, in effect, claims that the owner is entitled to no more than the value of the land as of date of taking, to be paid at a later time when ascertained. This suit is a part of the authorized procedure initiated by the United States for the condemnation of land. The owner was not satisfied with the amount fixed by the President and sued. A necessary condition of the taking is the ascertainment and payment of just compensation. The requirement that just compensation shall be paid is comprehensive and includes all elements and no specific words to include interest is necessary when interest or its equivalent is a part of such compensation. Where the U. S. condemns and takes possession of land before ascertaining or paying compensation, the owner is not limited to the

value of the property at the time of the taking; he is entitled to such addition as will produce the full equivalent of that value, contemporaneous with the taking. Interest at a proper rate is good measure by which to ascertain the amount to be added. The legal rate of interest as established by the South Carolina statute was applied in this case.

"This was a palpable and reasonable method of perfecting the indispensable condition to the exercise of the right of eminent domain, namely: of making 'just compensation' for the land just as it stands at the time of taking. The addition of interest allowed by the United States Court is necessary in order that the owner shall not suffer loss and shall have just compensation to which he is entitled."

If a railroad company is entitled to interest on the market value of property taken, as held in the Seaboard case, is there any reason why appellant should be placed outside the protection of the constitution?

To do so would be to discriminate in favor of railroads and against appellant. That this court will not do, for it will not be a "respecter of person" but the protection guaranteed by the Constitution will be impartially applied in the case at bar, and this court will not permit the right to "just compensation" to be arbitrarily and unjustly taken from appellant.

Appellant is entitled in the case at bar on the record as certified to this court (meagre and unfair to appellant as it is) to judgment for the equivalent of interest on the declared market value of the tugs and barges from the time of taking until paid, together with the amount of the remaining unpaid 25% of declared market value.

The Court of Claims adjudged that the tugs and barges were commandeered August 3, 1917; that the tugs were actually taken possession of on October 12, 1917, and the barges October 18, 1917; that the tugs and barges were of the market value of $1,500,000; that 75% thereof, to wit $1,125,000 was paid appellant on December 29, 1917, leaving unpaid the balance of 25%, $375,000.

The tugs and barges were, in contemplation of law, taken at the time they were commandeered on August 3rd, 1917 and interest on their market value should be paid from that date if the "just compensation" provided by the Constitution is paid. After the property was commandeered appellant was deprived of their unrestricted use, although the Government might delay in taking physical possession.

Unless the Seaboard case and the case therein cited are overruled, appellant is entitled to be paid according to the facts found by the Court of Claims, interest at the legal rate of 6% per annum on the market value of the property taken from August 3rd, 1917 until paid.

The market value of the property found by the Court of Claims at the time of taking is $1,500,000.

On December 29th, 1917, 75% of that amount without interest was paid appellant, leaving due under the finding of the Court of Claims $375,000

Interest on $1,500,000 at 6% from August 3rd, to December 29th, 1917 36,500

Interest on $375,000 from December 29th, 1917 to December 29th, 1925 170,000

Total amount due December 29th, 1925 under the facts as found by the Court of Claims as the law is construed in the Seaboard case $581,500

Appellant is entitled to a judgment for that amount and interest in any event, it is respectfully submitted, unless this court is ready to reverse the well settled law as set forth in the Seaboard and other cases, and establish the principal that "rules of law" have been abrogated.

POINT II.

That the record on appeal "speak the truth" is a substantial right of appellant. The record in this case fails to do so and does not comply with the rules of the Supreme Court.

The record herein is so meagre as to make it difficult for the court to determine wherein the Court of Claims denied appellant the protection to which it is entitled under the law.

The Court of Claims directed its clerk in making up the record to comply "with the rule in the Supreme Court."

It is respectfully submitted that if the record on appeal in this case complies "with the rule in the Supreme Court," then such rule is in conflict with the constitution of the United States, and this court will permit no rule to nullify the fundamental law by which the court itself was brought into being and exercises its functions.

The record on appeal as prepared under direction of the Court of Claims is so framed as to withhold from this court that which is essential to be before an appellate court to enable it to make an intelligent disposition of the case on appeal.

If in an appeal to this court the record can be made up in compliance "With the Rule in the Supreme Court"

so as to withhold the facts upon which the Court of Claims refused to apply the rules of evidence, then, it is respectfully submitted, this court will not by technicality of any sort permit its rules to be used as a pretext for overriding the fundamental law of the nation.

In the case at bar, defendant contends that by reason the "rule of the Supreme Court" as to the contents of the record of the case on appeal from the Court of Claims, that this court is powerless to protect the rights guaranteed appellant by the Constitution; that the record on appeal must be so made up and certified that the facts upon which the judgment of the Court of Claims is based shall be concealed from the appellate court; that whether the evidence in the record upon which the judgment should be based was competent or incompetent, relevant or irrelevant, cannot be brought to the attention of the appellate court; that technical rules for the guidance of clerks as to the form of the record of case on appeal estop this court from giving the protection that the Constitution guarantees.

This court will look through form to substance. The protection guaranteed by the fundamental law of the land is superior to any rule promulgated for direction of clerks—and this court will not subrogate substantial rights to technical forms, though the urge to do so comes from the Department of Justice.

In the Pacific railroad case that came before this court more than a quarter of a century ago, it was held by a divided court that the Sherman Anti-Trust law was binding in the exact words as embodied in the act of Congress; the court refused to write the word "unreasonable" before "restraint of trade" in the act.

Following this there was development of combinations to such an extent that practically every product and branch of business was more or less affected by the anti-trust law.

Construction of this law came before this court again in the Standard Oil and Tobacco cases—two combinations that by their ramifications have entered into the lives of the people of the nation.

Effort was again made to have the court write "unreasonable" restraint of trade. The court construed the law to relieve its "hard and fast" rule theretofore approved by the courts, by adopting the "rule of reason."

If there has been any case before this court in which the "rule of reason" should be invoked, the case at bar is such a case.

In his dissenting opinion Justice Harlan in the Standard Oil Case (221 U. S. 68) gives expression to principles of law that if applied in the case at bar, the judgment of the Court of Claims will not be affirmed:

> "The illustrious men who laid the foundations of our institutions deemed no part of the National Constitution of more consequence or more essential to the permanency of our form of government than the provisions under which were distributed the powers of Government among three separate, equal and coordinate departments—legislative, executive, and judicial * * *. No department of that Government can constitutionally exercise the powers committed strictly to another and separate department * * *.
>
> Mr. Justice Bradley wisely said, when on this bench, 'that illegitimate and unconstitutional practices get their first footing by silent approaches and

> slight deviations from legal modes of legal procedure.' Boyd *v.* United States, 116 U. S. 616, 635. We shall do well to heed the warnings of that great jurist."

A Board of Appraisal comes under the administrative department and cannot exercise the functions of the judicial.

This court has applied the "rule of reason" in other cases and, it is respectfully submitted, that, if the precedents established by this court are adhered to, the judgment of the Court of Claims cannot be affirmed.

In the case of Standard Oil Company of New Jersey, petitioner, *vs.* Southern Pacific Company and James C. Davis, Director General of Railroads (265 U. S. 564), the court rendered a judgment which prevented the Standard Oil Company from receiving the same sort of treatment that appellant has been accorded in the case at bar. The "rule of reason" and the application of principles of common honesty were enforced. The facts in that case were given due consideration in accordance with established rules of evidence, and the constitutional right of the Standard Oil Company to be paid "just compensation" for private property taken for public use was given practical effect.

As in the Seaboard case, the opinion of the court was delivered by Mr. Justice Butler:

> "The petition to this court for a writ of certiorari alleges that at the time of the collision the *Proteus* was under the sole control of the Director General of Railroads * * *. After the expiration of the term of the Circuit Court of Appeals, peti-

tioner learned that a final settlement had been made between the Southern Pacific Company and the Director General by which the liability of the latter for the loss of the *Proteus* was satisfied by payment of $750,000 * * *. The petition was granted * * *. By leave of this court additional testimony relating to the settlement was taken * * *. There was no agreement as to the value of the *Proteus* * * *. No question of tort or negligence on the part of the Director General was involved * * *. In case of total loss of a vessel," (*and the same must be true where commandeered and taken*), "the measure of damages is its market value, if it has a market value, at the time of destruction * * *. Where there is no market value * * * other evidence is resorted to.

The value of the vessel lost properly may be taken to be the sum which, considering all the circumstances, probably could have been obtained for her on the date of the collision; that is, the sum that in all probability would result from fair negotiations between an owner willing to sell and a purchaser desiring to buy. Brooks-Scanlon Corporation *vs.* United States, 265 U. S. 106, 123. And by numerous decisions of this court, it is firmly established that the cost of reproduction as of the date of valuation constitutes evidence properly to be considered in the ascertainment of value. Southwestern Bell Telephone Co. *vs.* Public Service Commission, 262 U. S. 276, 287, and cases cited; Bluefield Co. *vs.* Public Service Commission, 262 U. S. 679, 689; Georgia Ry. & Power Co. *vs.* Railroad Commission, 262 U. S. 625, 629; Brooks-Scanlon Corporation *vs.* United States, *supra*, 125; Ohio Utilities Company *vs.* Public Utilities Commission, decided March 2, 1925, ... U. S. ..... The same rule is applied in England. *In re* Mersey Docks and Admiralty Commissioners (1920), 3 K. B.

223; Toronto City Corporation *vs.* Toronto Railway Corporation (1925), A. C. 177, 191). It is to be borne in mind that value is the thing to be found and that neither cost of reproduction new, nor that less depreciation, is the measure or sole guide. The ascertainment of value is not controlled by artificial rules. It is not a matter of formulas, but there must be a reasonable judgment having its basis in a proper consideration of all relevant facts. Minnesota Rate Cases, 230 U. S. 352, 434. * * *

The District Court found that in 1917 and 1918, on account of unprecedented demand and a shortage of shipbuilding facilities, the market value of ships was higher than the cost of construction; and also found that in 1918, when the *Proteus* was lost, the cost of construction was approaching the peak which came some months later. 285 Fed. 619, 620. Respondents called three witnesses experienced in shipbuilding and familiar with construction costs and value of ships in 1918. Each made an estimate of the cost of reproduction of the *Proteus* as of the date of the loss. Their estimates were respectively $1,755,450, $1,750,000 and $1,750,000. One of these witnesses and two others called by respondent testified respectively that in 1918 the value of the *Proteus* was $1,225,000, $1,297,637 and $1,350,000. * * *

In view of changed prices, the original cost of the vessel was not useful as a guide to her value when lost. * * *

It is the market price which the Court looks to, and nothing else, as the value of the property. It is an old saying, 'The worth of a thing is the price it will bring.' And see City of Winona *vs.* Wisconsin-Minnesota Light & Power Co., 276 Fed. 996, 1003. * * *

The evidence requires a finding that, as of the date of her loss, the cost of reproduction new of the *Proteus* was not less than $1,750,000. * * *

In August, 1918, the immediate demand for ships was greater than the supply; the shipyards were working to full capacity; wages and prices were high; the trend of construction costs was upward, and the element of time was of the utmost importance. And witnesses on both sides testified that such conditions make for a lower rate of depreciation to be taken into account in determining value. If new, the *Proteus* would have been worth at least her cost of reproduction. Plainly, conditions in 1918 justified a smaller deduction from cost of reproduction new than before the war, and made value of a vessel in good condition and ready for use approach more nearly its value new. * * *

The value fixed by each of petitioner's witnesses is more than $1,000,000 less than the reproduction cost. The rate of depreciation taken by petitioner's mechanical engineer is too high in view of the conditions prevailing at the time of the loss. The other witnesses based their calculation on a reproduction cost that was too low. *Moreover, certain valuations made by the government board of appraisers of which they were members seriously impair the weight of their testimony.* In 1917, the United States requisitioned the Havana and the Saratoga, vessels of the same type as the *Proteus* and about one and a half times its size, and constructed in 1906. Cramps estimated reproduction cost of each in 1917 to be $3,000,000, about three times original cost. The board fixed value at $2,240,000 each, about 74 per cent. of reproduction cost. But the value of the *Proteus* as given by these witnesses was less than 38 per cent. of her cost of reproduction new. * * *

> We think the commissioner and district court failed to give due regard to construction costs, conditions, wages and prices affecting value in 1918; and that the evidence sustains the decree of the Circuit Court of Appeals."

If this court can go through the technical shield of the Board of Appraisal (behind which the Government retired) so as to prevent "confiscation" of the property of the Standard Oil Company, is there any reason why a different course should be adopted when the rights of the Luckenbach Steamship Company are involved?

If the evidence produced in the Court of Claims is given the same application as similar facts were given in the Standard Oil case, then this court cannot do otherwise, it is respectfully submitted, than render a judgment which will enable appellant to collect the market value of the tugs and barges taken by the Government at the time taken and interest until paid. The evidence shows this to be in excess of four million dollars.

It is not conceivable that this court will permit the Constitution to be so entangled in rules and red tape that the property of a citizen can be confiscated and the citizen denied an opportunity to have his rights adjudged in conformity with the guarantees of the Constitution—especially in view of the protection given the Standard Oil Company.

POINT III.

"Just compensation" must be determined by competent evidence and courts have no right to abrogate their judicial functions and shift their responsibility to any board or other agency.

> "The ascertainment of compensation is a judicial function, and no power exists in any other department of the Government to declare what the compensation should be, or to prescribe any binding rule in that regard." Monongahela Navigation Co. *vs.* U. S., 148 U. S. 312-317.

The Court of Claims in this case specifically states that it has abandoned its judicial function and passed to the Board of Appraisal the responsibility of determining the "just compensation" to which appellant is entitled.

The court says of the evidence presented in the Court

> "Much of the evidence submitted is wholly irrelevant and does not concern the value of the tugs and barges at the time they were taken; the expert evidence is vague and indefinite, and is largely if, not altogether, speculative and conjectural" (R., 10).

In explanation of the abandonment of its judicial function and the adoption of the finding of the Board of Appraisal, the court says:

> "The valuation placed on the tugs and barges of plaintiff by the Board of Appraisal is a fair one, and that the compensation awarded by the president is just." The Board of Appraisal made an exhaustive examination of these tugs and barges at the same

> time, or just before, they were taken and the valuation set by the board is fair and liberal (R. 10).

This is a concise and unequivocal statement by the court that it refuses to accept and meet the responsibility laid on it by the law to determine from the competent evidence offered in the Court of Claims, the "just compensation" that appellant is entitled to receive.

The court cannot legally shift this responsibility to the Board of Appraisal or the President.

If the court's designation of the evidence is limited in its application to that of defendant it is correct; the so-called expert evidence offered by defendant is "vague and indefinite and largely, if not altogether speculative and conjectural."

The court must base its judgment on evidence produced in court, and when it refuses to make evidence the basis of its judgment (as it plainly states it did in the case at bar) it ceases to perform the functions of a court and its decision is used to give dignity and force to the finding of an administrative board of another department of the Government which came to its conclusion from unknown information, misinformation or prejudice.

There is no evidence in the record sustaining the judgment.

We have the authority of the Court of Claims that its judgment was based on the findings of the Board of Appraisal—and yet the opinion contains the misleading inference that the conclusion reached was "upon a careful review of *all* the evidence"—competent and incompetent.

Rules of Evidence Control.

The rules of evidence control the trial of cases in this Court. Mr. Justice Downey so held in *Globe Works* v. *United States* (53 Ct. Cls., 532):

> "The Supreme Court has said that the rules of evidence as deducted from the common law shall govern in this court and this court has so held."

In the same case the learned Justice amplifies and emphasizes the controlling force of the rules in evidence in the Court of Claims:

> "The primary question which presents itself is one of evidence, and the *competency* as evidence of the matter relied on as such. It should not be necessary to say, and but for that which is sometimes asked of us, we would not say, that a plaintiff seeking relief at the hands of this court must assume the burden of proof as in any other court of original jurisdiction, and if he successfully assumes that burden *it must be by competent evidence.* * * * *Right must be determined from competent evidence, and if the party upon whom the burden rests fails in that respect, he must fail in his remedy.*"

Much of the evidence offered by defendant justifies the assumption that counsel for defendant assumes that the statement of the Court that "*right must be determined from competent evidence*" applies exclusively to appellant, and that because the defendant is the Government, the rules of evidence have no application to proof offered by it; that "the king (sovereign) can do no wrong."

The inelegant, but expressive, old saw, that "what is sauce for the goose is sauce for the gander," is especially applicable to this contention of the defendant.

Appellant does not desire that violence be done in its favor to the well-settled rules of evidence, and it must respectfully insist that the defendant shall be required to make its proof in accordance with, and subject to, the same rules.

Conclusive Force of Facts Found.

The conclusive force given by the Supreme Court to facts found by this Court justifies appellant in insisting on an impartial application of the rules of evidence to proof offered by defendant as well as to that offered by appellant.

In delivering the opinion of the Court in *Brothers* v. *United States* (252 U. S. 88, at page 93), Justice Pitney said:

> "For the purpose of our review, the findings of the Court of Claims are to be treated like the verdict of a jury, and this court is not at liberty to refer to the evidence, any more than to the opinion, for the purpose of eking out, controlling or modifying its scope."

In *Delaware and Lackawanna Railroad* v. *United States* (54 Ct. Clms., 35, at p. 42), Chief Justice Campbell says:

> "It should be recognized that the conclusiveness accorded by the rules and the decisions of the Supreme Court to the findings of this court (they being in the nature of special verdicts), places a grave responsibility upon this court, and upon parties as well, to have evidence in the record upon which to base them."

It is respectfully submitted that equal responsibility rests upon the Court to exclude from the record patently and unmistakably incompetent and irrelevant evidence calculated, whether intended or not, to mislead the Court and prejudice the rights of appellant.

There appears in the record a persistent padding with testimony so irrelevant and incompetent that it amounts to a serious injustice to appellant, and unless corrected by the Court, reduces the trial of the action to a contest in which bulk is substituted for evidence and confusion for clarity.

This incompetent and irrelevant testimony is offered by the defendant for a purpose. The tendency of the same must be to confuse and mislead with the hope that the Court will arrive at a different conclusion and render a different judgment with this incompetent testimony in the record than would be rendered if the Court has before it only competent and relevant testimony.

The introduction of this utterly incompetent testimony leads to the conclusion that counsel for the defendant are proceeding upon the mistaken theory that the Court of Claims is only a department of the Government, instead of being a court with profound respect for the constitution of the nation, applying with impartiality the rules of evidence by which causes are, and of right should be, tried and determined by this Court.

If appellant had been satisfied with the compensation found by the Board of Appraisal and *pro forma* fixed by the President it would have accepted the same and no suit would have been brought. Not being satisfied, however, it took action in the Court of Claims to enforce its rights guaranteed by the Constitution.

POINT IV.

The competent evidence in the record does not support the findings of fact or the conclusion of law of the Court of Claims.

If the rules of evidence as deduced from the common law govern in this court, the findings of the Board of Appraisal will be excluded from consideration by the court in its findings of fact and its conclusion of law.

Incompetent evidence will not be permitted to be used as a basis for expert evidence, and the one upon whom the burden rests will fail in his remedy if he relies upon such evidence. If the incompetent evidence is excluded and the "just compensation" guaranteed by the constitution determined on the competent evidence only and the precedent set by this Court in favor of the Standard Oil Company (265 U. S. 564) is applied in this case, the court will find the value of the five tugs and twelve barges taken at more than Four Million ($4,000,000) Dollars at the time they were taken.

What Property Was Taken.

It is undisputed that a fleet of five steam tugs and twelve barges were taken from appellant by defendant. What were these tugs and barges; what was their construction, age, equipment and condition at the time they were taken are questions which the Court must first ascertain as a basis upon which to determine "just compensation."

How can these facts be ascertained? Is there any trustworthy basis in the record which the Court may use as a standard by which to determine the value of the property

taken and the just compensation to which appellant is entitled?

Surveys Made by the Navy Furnish a Reliable Basis.

Appellant offered in evidence report of a survey of each tug and barge made by the Navy shortly before the same were physically taken possession of, and report of a resurvey of each made immediately after the tugs and barges were taken physical possession of by the defendant. (Pages 46-136.)

These surveys were offered in evidence by appellant:

> "To show the condition, adaptability and suitability of the tugs and barges as an element to be taken into account in arriving at a basis upon which the value of said tugs and barges at the time they were acquired by the Government is to be determined (p. 46)."

These surveys were made by the Navy and were used as a basis upon which to deal physically with the tugs and barges taken, and upon which offer of settlement was made to appellant. Appellant accepts the surveys (except as to value) and asserts that they evidence an honest and intelligent effort made in the orderly performance of duty by men selected by the Navy to ascertain the construction and condition of the tugs and barges at the time they were commandeered by the Government.

It is made perfectly clear by the testimony of Captain Gillmor that the Joint Merchant Vessel Board had nothing to do with or jurisdiction over the matter of determining the reasonable and fair value of a vessel which had been taken over or was contemplated to be taken over by the Navy. (Q. 270.)

When these surveys were offered in evidence by appellant, it was stated:

> "The fact that Naval Officers are eminently qualified to ascertain the physical condition of tugs and barges is recognized, but the duty of such officers does not require that they shall be posted as to the commercial value thereof, however familiar they may be with the cost of material and of construction."

There could be no more convincing evidence of this statement than the fact that the surveys offered in evidence and signed by the Joint Army & Navy Merchant Vessel Board embody and adopt the estimate of values found by the Naval District Section, and is the basis upon which reports were made to the Navy Department, and said survey is the basis upon which the Secretary of the Navy finds the value of the tugs and barges, and upon which compensation was fixed by the Board of Appraisal for the acquisition of said tugs and barges.

Value Found by the Navy.

The attention of the Court is, therefore, called to the estimate as to value by the Joint Merchant Vessel Board, and the value as a basis for compensation as fixed by the Naval Board of Appraisal and accepted by the Secretary of the Navy upon which settlement for 75% of the same has been made with appellant.

Tugs		Value in Survey	Value by Board of Appraisal and Accepted by Secretary of the Navy
No. 1	(Exhibit 1)	$ 75,000.00	$ 245,455.00
" 2	(Exhibit 2)	100,000.00	136,364.00
" 3	(Exhibit 3)	150,000.00	245,455.00
" 4	(Exhibit 4)	180,000.00	272,727.00
" 5	(Exhibit 5)	100,000.00	184,091.00
		$605,000.00	$1,084,092.00

Barges		Dead Weight	Value Survey	Per Ton	Value Bd Appraisal	Per Ton
Babcock	(Exhibit 6)	3,350	75,000.00	22.00	45,000.00	13.00
Walker	(Exhibit 7)	3,300	20,000.00	6.00	38,181.00	12.00
Seneca	(Exhibit 8)	3,800	100,000.00	26.00	68,182.00	18.00
Carrie Clark	(Exhibit 9)	1,850	25,000.00	13.00	20,455.00	11.00
General Knox	(Exhibit 10)	2,450	60,000.00	24.00	32,727.00	13.00
Washington	(Exhibit 11)	2,650	50,000.00	18.00	32,727.00	12.00
Old Dominion	(Exhibit 12)	1,870	35,000.00	18.00	47,727.00	13.00
Josephus	(Exhibit 13)	2,200	25,000.00	11.00	27,273.00	12.00
San Joaquin	(Exhibit 14)	2,400	15,000.00	6.00	21,818.00	9.00
Sargent	(Exhibit 15)	2,450	20,000.00	8.00	27,273.00	11.00
Solitaire	(Exhibit 16)	2,300	25,000.00	10.00	30,000.00	13.00
West Point	(Exhibit 17)	1,870	10,000.00	5.00	24,545.00	13.00
	Barges—	35,545	460,000.00		415,908.00	
	Tugs—		605,000.00		1,084,092.00	
	Total of the Fleet—		1,065,000.00		1,500,000.00	

Instead of attacking the work of the Navy in making survey of these tugs and barges, appellant accepts same as a reliable basis from which the Court may find the facts as to the construction and condition of the tugs and barges when commandeered. The Court may assume that these surveys honestly and accurately describe the tugs and barges as they were at the time they were commandeered and taken by the Government. If these surveys are to be attacked and the action of the Navy assailed and repudiated, the defendant must assume the responsibility for doing so, for appellant will not.

How the Surveys Were Made.

The surveys of the five tugs and twelve barges were made by men selected by the Navy to perform their duty because of their recognized capacity, training and fitness.

Captain Horatio G. Gillmor, a witness for defendant, is a Naval Officer and a member of the Joint Army & Navy Vessel Board who acted as a member of such board and signed the report of the surveys appearing in the record of the five tugs and twelve barges. He is the only member of the board who signed and reported these surveys who was offered as a witness by defendant. He has been active in behalf of the defendant in the trial of this case, and is perfectly familiar with the method pursued in obtaining the information, making the surveys and preparing the reports of the surveys. He describes in his testimony the method pursued to secure the information to make these surveys a complete and reliable basis upon which to deal physically with the tugs and barges, and as furnishing the necessary facts upon which the Court may ascertain the construction and condition of the tugs and barges when taken so that their market value may be determined as a basis upon which "just compensation" may be decreed.

Evidence Offered by Defendant to Discredit the Navy.

The defendant offered a large number of witnesses for the evident purpose of discrediting the Navy and to show that the surveys made by it were not worthy of consideration by the Court. Among other witnesses offered for that purpose were many who were connected with the Navy in

various positions. *Not one of the men selected by the Navy who actually inspected these tugs and barges, whose duty it was to ascertain and report their construction and condition, was offered as a witness.* Only one member of the board who signed these surveys was offered as a witness—although most of those who actually inspected and who made report could have been produced by defendant. It is assumed that *if it had been desirable to give the Court the facts* as to the condition of this private property taken for public use, instead of presenting a distorted picture by cooks, shoe salesmen, carpenters, chauffeurs, movie actors, and others, after the tugs and barges had been taken over by defendant, repaired, changed and used, the men who were officially designated and who actually inspected and surveyed these tugs and barges would have been offered as witnesses.

Naval Survey the Best Evidence.

Analysis of evidence offered by defendant that assails and seeks to discredit the surveys made by the Navy offered in evidence by claimant, must convince the court that the surveys furnished the *only* evidence in the case upon which it can safely rely to determine what was commandeered and taken.

It is respectfully submitted that the overwhelming weight of the evidence substantiates the surveys made by the Navy and the court cannot fail to find that these surveys are *the best evidence* as to the five tugs and twelve barges taken by the Government; that they furnish reliable and trustworthy evidence as to the construction, age and

condition of the tugs and barges at the time they were commandeered and taken.

To find that these surveys were not reliable and that the court must reject them and rely upon the vagrant recollection of cooks, sailors, movie artists, salesmen, naval attaches, and other witnesses produced by the defendant, as to the condition of the tugs and barges, has the effect of repudiating and discrediting surveys made by men specially assigned by the Navy for that duty. To do so would be a judicial finding of incompetency or corruption that is not justified by the evidence in this case.

It is unthinkable that the Court would be asked by the Department of Justice to make such a finding upon evidence so flimsy, uncertain and disconnected as that offered in behalf of the defendant herein to discredit and repudiate surveys made by the Navy and used as a basis upon which to deal with these tugs and barges, both for the use of the Government and as the basis upon which to arrive at a figure for settlement as "just compensation."

Appellant submits that the court cannot do otherwise than accept the surveys as the *best evidence* as to what was taken for which "*just compensation*" must be made.

Market Value the Measure of Compensation.

Just compensation is the reasonable market value of the steam tugs and barges at the time they were commandeered and taken from appellant by defendant and interest thereon until paid. The tugs and barges were commandeered August 3rd, 1917, actually taken October 12th and 18th, 1917, and a Bill of Sale executed therefor on the 27th day of October, 1917.

At that time the country was at war, and the production

and sale of tugs and barges, as well as the material necessary to construct them, were in the hands of, or under the complete control of the Government, and the demand for means of water transportation was far in excess of the supply. The price of material and the cost of labor made the construction of the means of water transportation very expensive, if it was possible to secure the material and labor necessary to construct them. This was demonstrated by the high cost, at that period, of boats, tugs and barges built by the Emergency Fleet Corporation under the control of the Shipping Board (*Standard Oil* vs. *So. Pac. and Davis*, 265 U. S. 564).

The demand for means of water transportation at and following the period that these tugs and barges were commandeered was so great, and the rate of freight so high, that the earning power of tugs, barges and boats was such that they would pay for the cost of construction, in many instances, in one round trip. The tugs, barges and boats registered under the flags of other countries, which were sold and traded in on the markets of this country, tend to establish a "measuring rod" by which the reasonable market value of the tugs and barges embraced in this action may be satisfactorily ascertained.

"Just compensation" is the reasonable market value of the private property taken by the Government.

Three factors, it is respectfully submitted, may safely be taken into consideration in determining what is the reasonable market value of the private property taken by the Government, to wit:

(a) The price which might reasonably be presumed would be agreed upon between a willing buyer and a willing seller;

(b) The cost of reproducing tugs and barges of similar character at the period when those involved in this action were commandeered by the Government, upon the basis of the cost of labor and material at that time, with the added value of immediate possession with the consequent added earning power, surcharged with reasonable discount by virtue of the age and condition of the steam tugs and barges, presents a basis for ascertaining the "just compensation" to be paid appellant to which the court may well give serious consideration;

(c) The earning power of the steam tugs and barges at and following the period when the same were commandeered by the Government, taking into account the freight charges at that period and following, is an element upon which the reasonable market value may well be based which should not be overlooked or minimized in ascertaining what is "just compensation."

> "The plaintiff is entitled to the value of the plant *at the time it was taken.*" *Pacific Coast Construction Co.* vs. *U. S.*, 53 Ct. Cls. 582 (at p. 590).
>
> "Where private property is taken for public use and there is a market price prevailing at the time and place of taking, that price is just compensation." *Vogelstein* vs. *United States*, 262 U. S. 337; *New River Colliery Co.* vs. *U. S.* 262 U. S. 341- ? ??
>
> "The general rule is, of course, when one is entitled in any form of action to compensation based on the value of the property, the measure of recovery, when such property can be procured in the market, is the value of it in the market and not the cost." *Blake* vs. *U. S.*, 275 Fed. 861 (p. 863).
>
> "Just Compensation" is fair market value. *Nat. City Bank* vs. *U. S.*, 275 Fed. 855.

Prince Line, Ltd. vs. *U. S.* (tried before Judge Chatfield, Aug. 23, 1922, who delivered opinion on "reasonable market value"), 283 Fed. 535.

"It is impossible to ascertain what will amount to a fair return upon properties devoted to public service without giving consideration to the cost of labor, supplies, etc., at the time the investigation is made. * * * If the highly important element of present cost is wholly disregarded such a forecast becomes impossible." *Missouri ex rel. Southwestern Bell Telephone Co.* vs. *Public Service Commission of Mo.*, U. S. Supreme Court, May 21, 1923, opinion by McReynolds, Justice.

The Good Will of a Going Concern Has Market Value.

The evidence before the Court of Claims shows that the five tugs and twelve barges taken as separate entities were of the value of more than Four Million Dollars. The fleet as a whole and the business which the fleet did, had a substantial value that appellant is entitled to be compensated for.

The tugs and barges were of large size and of far superior class from the average tugs and barges that were being used in transportation on the Atlantic coast.

The evidence shows that the fleet was taken as a whole and the business of the Luckenbach Steamship Company, which took years to build up, was destroyed when its tugs and barges were taken by the defendant. It is entitled to receive compensation for its good will and its established business.

The court's attention is directed to the statement of the Luckenbach Steamship Company made by its president, and appearing in the record of evidence in the Court of Claims on page 1013 &c., which gives in detail facts and figures

from which the market value of the business as a going concern may be determined.

Defendant laboriously argues that this business was in no sense a monopoly and thereby supplements the contention of appellant that it is entitled to be compensated for the market value of its business taken and destroyed. There being no monopoly, the element of good will entered into determining the market value of the property taken—a part of which was good will and an established business.

The case of the *Consolidated Gas Company of New York* vs. *Wilcox*, (157 Fed. 849, and affirmed by the Supreme Court in 212 U. S. 19) was the so-called 80 cent gas case. The rate was claimed to be confiscatory on the basis that the good will of the company was not taken into account. The elements of good will entering into the value of the property was fully discussed by Judge Hough, delivering the opinion of the court.

In delivering the opinion of the Supreme Court on appeal Mr. Justice Peckham (212 U. S., p. 19, at p. 12) said:

> "The complainant has a monopoly in fact and a consumer must take gas from it or go without. He will resort to the old stand because he cannot get gas anywhere else."

The syllabus at page 22 says:

> "Where a public service corporation has a monopoly, such as supplying gas in a large city, good will cannot be considered as an element of value of property employed."

In the Prince Line, Ltd. (283 Fed. 535) in deciding the question as to "just compensation" for pier requisitioned by the United States under the Lever Act, August 10th,

1917, held that a fair value was "in accordance with the law of supply and demand at the time of the taking." Writ of error in this action was dismissed (263 U. S. 727). To the same effect is the case of U. S. *vs.* Benedict (280 Fed. 76), which is affirmed in 261 U. S. 294.

In the case of New York Telephone Co. *vs.* Prendergast, 300 Fed. 822, at page 826, the court composed of Justices Hough, Knox and Winslow, in a *per curiam* opinion, in discussing the findings of the commission and illustrating when good will is taken into consideration in fixing the value of property, says:

> "A garment is made out of cloth and silk, buttons and thread, and by labor; but when completed and well made, its value is more than the aggregate cost of the item."
>
> "It is a going concern and as such has going values."
>
> "It is found that this plaintiff (the New York Telephone Co.) was created and does function very well; therefore it has going values because it goes well. The amount may be difficult of ascertainment, but that going value exists is self evident."

Expert or Opinion Evidence Competent as to Market Value.

The Court having determined what has been taken for which "just compensation" must be made, the evidence of expert witnesses is competent for the purpose of enlightening the Court as to the reasonable market value of the private property taken.

> "Testimony in the shape of inferences or conclusions rests always on certain premises of fact.

* * * These premises, a consideration of which is essential to the formation of the conclusion or opinion, must somehow be supplied by testimony. * * * If * * * a witness is put forward to testify to the conclusion, the premises considered by him must be expressly stated, as the basis of his conclusion; otherwise, since his conclusion rests for its validity upon a consideration of the premises, and since the tribunal may later decide that certain premises are not proved and may thus reject them, it must, before accepting his conclusion, have the means of knowing whether it is based on a consideration of premises accepted as true by the tribunal. If these premises are not made to accompany the conclusion, the tribunal might be accepting a conclusion for which the witness had considered premises found by the tribunal not to be true; hence the premises must be stated hypothetically in connection with the conclusion; then, by other testimony, the material for determining the truth of the assumed premises may be furnished to the tribunal.

The key to the situation, in short, is that there may be two distinct subjects of testimony—premises, and inferences, or conclusions; that the latter involves necessarily a consideration of the former; and that the tribunal must be furnished with the means of rejecting the latter if upon consultation they determine to reject the former, i. e., of distinguishing conclusions properly founded from conclusions improperly founded. That this is the orthodox and accepted theory of the hypothetical question in our law may be gathered from the following (the author cites numerous cases sustaining the text). *Wigmore on Evidence,* Section 672."

Evidence of Appellant's Expert Witnesses.

Appellant offered as expert witnesses those possessing skill beyond that of a jury, and it desires to emphasize to the Court the contrast in this respect between the experts offered by appellant and the witnesses offered by defendant as to their possession of skill.

Appellant offered in evidence the surveys made by the Navy, and its expert witnesses were examined on the basis of the facts set forth in said surveys. There is, therefore, no question as to the basis upon which appellant's witnesses were examined and upon which their opinions are based, and it is respectfully submitted that the Court cannot do otherwise than accept the surveys made by the Navy.

None of the witnesses appellant offered as expert or opinion witnesses were employed by or connected with it in any way. Every expert witness offered by it was an expert in fact, whose experience, knowledge and training entitled him to express opinion upon which the Court can rely.

The basis upon which the expert witnesses offered by appellant gave opinion were the surveys made by the Navy. Appellant met the "rules of evidence deduced from the common law" (*Globe Works* vs. *U. S.*, 53 Ct. Cls., p. 535) which the Supreme Court has said should govern in the Court of Claims and which Court has so held.

Basis Not Proven for Opinion of Alleged Experts on the Defendant's Hypothetical Questions.

Finding that it cannot afford to ask the Court to disregard the testimony of the appellant's qualified expert witnesses, based on the Navy's survey, and recognizing the fact that the Court cannot afford to accept the evidence of defendant's witnesses in refutation of appellant's case so clearly made out, defendant attempts to set up a new basis for opinion evidence.

The alleged facts embraced in the hypothetical questions asked by defendant are not proven, and what purports to be the description of the tugs and barges is so vague and meagre as to make it impossible for a witness to give a dependable opinion on such data, even if the evidence of the alleged facts embraced therein were competent and trustworthy.

What Was the Value of Tugs and Barges When Commandeered.

The evidence is the only basis from which the Court can ascertain value and determine "just compensation". In the words of Mr. Justice Downey, "it should not be necessary to say that *competent evidence*" is the only evidence that this court will consider, and "if the party upon whom the burden rests fails in that respect, he must fail in his remedy."

It is proven by *competent evidence*:

That the five tugs and twelve barges were commandeered and taken from appellant by defendant:

That the Navy Survey furnishes the best evidence of the construction and condition of the tug and barges when taken, and makes a reliable basis for expert or opinion evidence as to the value of the private property taken for public use.

The Court must determine the "just compensation" to which appellant is entitled by the weight of the *competent evidence.*

Only Expert Evidence Based on Navy Survey Competent.

The only evidence upon which the Court can consider (under the rules of evidence by which this Court is governed), is that based on the Navy Survey, because that is the *only competent* evidence of the construction and condition of the tugs and barges before the Court at the time they were taken.

Appellant offers nine expert witnesses, qualified by training and experience, to give *expert* evidence. They have under oath given their opinion, based on the Navy Survey. Not one of these witnesses is in any way connected with appellant, or directly or indirectly interested in the outcome of this action. Each of them occupies a position in the business world that furnishes a guaranty that the Court may rely on his opinion. His intelligent judgment is based on his knowledge of the market value of the tugs and barges at the time they were commandeered and taken and on the condition of the tugs and barges as shown by the survey made by the Navy.

The evidence shows that at and immediately following the time these tugs and barges were taken from appellant

that such tugs were making $500. a day, and that $5. per ton was being paid for freight from one point to another along the Atlantic Coast.

The returns from hauling freight equal to the "dead weight" tonnage of the barge *Babcock, Walker* or *Seneca* at $5 per dead weight ton, would have paid the value of one of the barges (average) as fixed by defendant's witnesses.

According to the opinion evidence (average) of defendant's witnesses, based on the Navy Survey, the entire value of the fleet of five tugs and twelve barges would have been paid by hauling 129,370 tons of freight (less than four times the aggregate dead weight tonnage of the barges), from one point to another along the Atlantic Coast.

POINT V.

"Due process of law" requires that the law be applied with impartiality even though the defendant is the sovereign and permits itself to be sued by one of its citizens.

When one citizen proceeds against another in the courts of the United States, he has the full protection of the Constitution. The Fifth Amendment guarantees him the right of "due process of law" and provides a "rule of action" by which the rights of parties are adjudged.

The courts do not refuse to apply the rules of evidence as deduced from the common law when the contest is between individuals or private corporations.

Why make an exception when the Government is a party?

Parties have the right to insist that the competency or

incompetency of evidence be determined by the court, and that they be permitted to cross examine witnesses.

The primary question presented in the trial of actions and recognized in courts that respect the constitution and the rights of the citizen, is one of evidence and a party seeking relief at the hands of a court must assume the burden of proof and if he successfully assumes that burden, it must be by competent evidence.

Unless there is some tribunal which hears and determines the competency and relevancy of evidence, then the party denied such hearing is denied his constitutional right of "due process of law."

If his property is taken by a judgment rendered by a court which refuses to hear and determine whether the evidence to which he objects is competent or incompetent, relevant or irrelevant, then his property is taken from him as much by force as if he were held up on the high seas by pirates or was made to "stand and deliver" by outlaws on land—however high the character and learned may be the judicial instrument through which he is deprived of his property. If the Court of Claims will not determine whether evidence is competent or incompetent, relevant or irrelevant, then, it is respectfully submitted, that the only remedy appellant has is to appeal to this Court to apply the law to the facts shown by the evidence.

In the case at bar the evidence in the record has never been passed on by the Court of Claims, and awaits the decision of this Court.

The members of the Court of Claims are men of integrity and learning and they expressly affirm that the judgment is not based on the evidence but is based on the finding

of the Board of Appraisal and that the members of the court are not responsible for the judgment rendered. (R., 10, Memorandum.)

Appellant made every possible effort to have the court, at some time, in some place and in some way, determine and segregate the incompetent and irrelevant testimony from the competent and relevant—but without success.

The Court of Claims refused to decide the case on the competent evidence.

A citizen is compelled to proceed against his government in a court established by the government and authorized to determine his rights according to the prescribed rules of law. He has to appear before the court provided for that purpose and the Court of Claims has delegated the function of taking testimony to commissioners, and the function of determining the value of the property taken and the "just compensation" to which appellant is entitled has been assigned to the Board of Appraisal.

The record in the case at bar is encumbered with incompetent evidence that beclouds the issue and appellant is not permitted to know whether the court has excluded from its consideration this incompetent evidence. The court specially says, however, that it has made no distinction between competent and incompetent evidence. (R., 10.)

The judgment of the Court of Claims clearly demonstrates the fact that it has not confined itself to competent testimony; but says in so many words that its judgment is based on the finding of the Board of Appraisal. Consequently it makes no practical difference whether or not the court so much as read the record—for the evidence was not the basis of its judgment.

Appellant's property has been taken by the Government and unless the courts make practical application of the fundamental law to this case, and the property taken and the amount of "just compensation" to which appellant is entitled, is determined in accordance with "due process of law" its property has been taken in violation of the law which the Government has proclaimed for the guidance of its citizens.

It is respectfully submitted to this court that the Government has given the citizen the right to bring suit in certain courts by it designated for the recovery of "just compensation" of property taken by the Government and that it will not use its power to confiscate the property of its citizens from whom it demands respect and loyalty.

To give the citizens opportunity to sue the Government in its courts and then to refuse to apply the rules of evidence that this court says shall apply would be "making the promise to the ear and breaking it to the hope."

> "And one of you say unto them, depart in peace, be ye warmed and filled; notwithstanding ye gave them not those things which are needful to the body: what doth it profit?"—Bible, James, 2 Chap., 16 Verse.

For defendant to ask the Court to find that the mandate of the Constitution that "private property shall not be taken for public use without just compensation" is complied with by making such figures as defendant asks the Court to accept as the basis for determining "just compensation" would be equivalent to asking the Court to determine that "just compensation" and "confiscation" mean the same thing.

Appellant asks (and it has the right to demand) that the Constitution shall not be overridden, but that "just compensation" shall be paid it by defendant, and that the facts shall be ascertained from competent evidence, and the law declared and applied according to the rules of evidence. As Justice Downey has said—"it would not be necessary to say this" (53 Ct. Cls. 532), but for the fact that this record is padded by defendant with irrelevant and incompetent evidence which is calculated to weary the Court and thereby work injustice to appellant.

POINT VI.

Appellant entitled to judgment for value of property taken and interest.

Appellant respectfully submits that upon the competent evidence in this case, appellant is entitled to have found that the fleet of five tugs and twelve barges taken from appellant by defendant was of the value, at the time commandeered, of at least $4,770,000., and that as a conclusion of law appellant is entitled to recover of the defendant the sum of Three million six hundred and forty-five thousand ($3,645,000.) Dollars, with interest thereon from the 3rd day of August, 1917, together with interest on the sum of $1,125,000. from the 3rd day of August, 1917, to the 29th day of December, 1917.

PETER S. CARTER,
C. C. DANIELS,
Attorneys for Appellant.

FILED
MAR 10 1926
WM. R. STANSBURY
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1925.

No. [redacted] 32

LUCKENBACH STEAMSHIP COMPANY, INC.,
Appellant,

v.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

REPLY BRIEF FOR APPELLANT.

The brief filed herein in the name of the United States demonstrates the astuteness of the able Solicitor General and his associates. This court is asked to strike from the files appellants' brief and to close its eyes and refuse to consider all of the questions presented by the record with the single exception of the question whether or not appellant is entitled to interest on the amount adjudged as the value of the property at the time taken.

It is an old trick of the artful lawyer to ignore facts that can not be met and to decline to recognize the law that is authority for the position of his opponent.

Defendant's brief shows those who drew it are past masters in the art of "making the worse appear the better reason" and are fully cognizant of the fact that if this court considers the issues involved in the appeal the judgment of the Court of Claims can not be affirmed—without doing violence to the Constitution which this court is jealous to preserve—consequently the insistance that the truth be withheld from this court.

The rule that the sovereign is immune to action by the citizen without its consent is one so obviously supported by every consideration of public policy that it is never challenged.

The rules of procedure for ascertaining the extent of damage suffered by the citizen at the hands of the sovereign in the exercise of its absolute authority, and the granting of relief to the citizen incident to the exercise of the authority, clearly arise from the dictates of justice and good faith.

It cannot be doubted that the very consideration that caused the sovereign to waive, under certain conditions, its immunity from suit by the citizen necessarily implies the further waiver of technical and far-fetched defenses by the sovereign against claims thus permitted to be asserted.

In other words, when the sovereign consents in the cause of justice to be sued at all, there is inherent in the permission a guaranty that unconscionable technical defenses shall not be interposed.

I.

Vituperation will not take the place of argument and denunciation cannot be effectually substituted for logic.

With the evident purpose of prejudicing this court against appellant, hoping thereby to prevent consideration of the issues in the appeal, vituperation is substituted for argument and denunciation for logic. Defendant's brief (p. 9) under the misleading title of "ARGUMENT" says:

> "If this case were to receive the treatment it deserves, the appellant's brief would be stricken from the file and the appeal dismissed. There is but one point made in the brief worthy of discussion, and that relates to the question of interest as a part of just compensation. The greater part of the fifty pages of appellant's brief are devoted to incoherent railings at the Court of Claims, to distortions of the findings of that Court, to statements wholly unsupported by the record, to the discussion of evidence in disregard of the explicit rule that on an appeal from the Court of Claims this Court will consider only the findings, and to the assertion that the rule of this Court that the findings and not the evidence shall be included in the record certified by the Court of Claims is 'unconstitutional.' We will pass over this mass of irrelevant matter, to deal only with the points meriting discussion."

With equal courtesy and propriety defendant's brief may be thus characterized:

Defendant's brief discloses the deliberate intent to divert the attention of the court from the issues involved in

the appeal; to substitute technical hairsplitting for honest discussion of the merits; by arbitrary misrepresentation of facts and ingenius and false deductions, excuse the taking of private property for public use, deny the owner the "just compensation" guaranteed by the constitution, and deprive him of a forum in which his right to compensation can be heard and determined in accordance with the established rules necessary to preserve "due process of law"; to deliberately and unjustly seek "under the forms of law" to put the Government in the unenviable attitude of confiscating a citizen's property and escaping liability by technical subterfuge.

Appellant has been deprived of the protection of the Constitution. Defendant's contention that the rules adopted for the guidance of Clerks are superior to the Constitution and estop this court from going "through form to substance" is by no means complimentary to this court, it is respectfully submitted.

The guarantees of the Constitution have not lost their force. The constitutional form of government established by the fathers will not be exchanged for autocratic rule, controlled by personal opinion or mistaken ideas of duty to save the Government from payment for private property taken by sovereign power for public use. This court will not permit the rules of evidence developed out of the wisdom of experience to be thrown in the scrap heap. The long line of decisions make it clear that this court will not lend itself to such subversive and dangerous doctrines as advocated by defendant with Machiavellian sophistry.

II.

Unless this court overrules and repudiates the Seaboard case, appellant must recover the equivalent interest.

Defendant graciously gives permission for this court to consider the question of interest.

The right of appellant to be paid the equivalent of interest is fully discussed in appellant's brief heretofore filed. In addition to what is therein said, we desire to call the attention of the court to certain statements made in defendant's brief and to point out some of the contentions therein contained.

Defendant contends that the tugs and barges taken from them were not commandeered under the act of Congress. This court is asked to believe that the officers who took this property, the Board of Appraisal, the Secretary of the Navy and the President, who certified that the same was commandeered under the specific act of Congress, did not know what they were saying and that the disbursing officers who paid appellant more than a million dollars on property commandeered and taken from appellant under authority of an Act of Congress, acted illegally and deserve censure, if not prosecution, for squandering public funds committed to them.

Defendant says, that the tugs and barges were purchased from appellant under contract entered into by appellant without knowledge, thus discrediting the intelligence of not only appellant but of the representatives of the Government. The statute that relieves the Government from payment of its interest is by this sophistry injected in the case. This discovery is entitled to rank with the discoveries of Dr. Cook of Arctic fame.

The Government, acting under the Act of Congress, commandeered and took from appellant its fleet consisting of five tugs and twelve barges; destroyed its prosperous business and acquired a perfect title to all of the tugs and barges constituting the fleet, full releases and conveyances were made by those who held any adverse interest in any of the tugs and barges and title confirmed and made perfect and thereupon the Government paid to appellant, the owner of the fleet, seventy-five per cent of the value of the fleet at the time of taking, as found by the Board of Appraisal. No question was raised as to ownership.

The judgment of the Court of Claims specifically finds that appellant was the owner of the fleet:

> "The Court, upon due consideration of the premises find in favor of the plaintiff, and do order and adjudge that the plaintiff, as aforesaid, is entitled to recover and shall have and recover of and from the United States the sum of Three hundred and seventy-five thousand dollars ($375,000.00)" (R. 11).

This necessarily carried with it adjudication that appellant was the owner of the fleet and entitled to be paid by the Government their value including every tug and barge, at the time they were taken. Defendant did not appeal from this judgment and is estopped to deny ownership by appellant.

The position of defendant that this court shall only apply the Seaboard case when railroad companies profit by its application but its application shall be withheld when its application inures to the benefit of appellant, is to say the least, novel. The reason assigned by defendant for this novel position is that.

> "The ordinary machinery for the payment of Government obligations will not, as a practical matter, permit of such an application. The routine covering Government expenditures, the auditing of vouchers, the issuance of warrants, etc., makes it difficult and practically impossible to include interest up to the very moment that payment is actually made and if that strict view of the Seaboard Air Line Railway decision is to be accepted, there will hardly be a case in which the United States can pay just compensation."

The mere statement of this position is sufficient to demonstrate that defendant is pleading not for the impartial administration of the law but for such application of the decisions of this court as officials of the Government see fit to make—however much injustice and partiality may result therefrom.

The record shows that appellant has at no time had the opportunity to accept the value of the property at the time of taking as determined by the Government with interest on that amount up to the time of the opportunity. No amount of sophistry can overcome this fact. If this court is not ready to repudiate the Seaboard case then the judgment of the Court of Claims cannot be affirmed.

The jurisdiction of this court can be defeated only by distortion of the facts and by unwarranted application of technicalities. The Court of Claims duly allowed the appeal from this judgment. The appeal from the judgment was duly taken and is pending in this court, and this will be considered and determined in accordance with law and good conscience.

III.

The competency and relevancy of evidence are questions of law that appellant is entitled to have determined.

If the Solicitor General and his associates do not distinguish between the competency and relevancy of evidence on the one hand and the weight of evidence on the other, appellant is not responsible and its counsel should not be charged with "railing" because they point out the difference.

Defendant contends that because of the consideration given to findings of the Court of Claims by this court, therefore all rules of evidence are abrogated and the hands of this court are tied so that it cannot consider whether there was any evidence to sustain the findings of fact made by the Court of Claims. Such a doctrine undermines the basic principles of law. If there was no evidence to sustain the findings of fact by the Court of Claims then appellant has a right under the law to have the facts found stricken from the record. If the findings of fact are based on incompetent evidence, then to that extent are the findings illegal and in conflict with the law as uniformly construed by this court. This is fully discussed in appellant's brief heretofore filed.

Appellant asks only that this court consider the questions raised by the appeal and when so considered, it is respectfully submitted, the judgment of the Court of Claims cannot be affirmed.

Respectfully submitted,

PETER S. CARTER,
C. C. DANIELS,
Attorneys for Appellant.

FILED
DEC 28 1926
WM. R. STANSBURY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1926.

No. 32.

LUCKENBACH STEAMSHIP COMPANY, INC., *Appellant*,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

NOTICE AND PETITION FOR REHEARING

PETER S. CARTER,
15 Whitehall Street.

C. C. DANIELS,
36 West 44th Street,
New York City,
Attorneys for Appellant.

Pandick Press, Inc., 22 Thames St., New York, U. S. A.

IN THE

Supreme Court of the United States

LUCKENBACH STEAMSHIP COMPANY, INC.,

Appellant,

vs.

THE UNITED STATES.

Sir:

PLEASE TAKE NOTICE that upon the annexed Petition for Rehearing, sworn to on the 24th day of December, 1926, by R. C. THACKARA, Vice President of appellant above named, we shall move for a rehearing of the appeal which was herein granted, before the Supreme Court of the United States at the Capitol, City of Washington, District of Columbia, on Monday, January 10, 1927, at the opening of the Court on that day or as soon thereafter as counsel can be heard and that we shall then and there move for such further relief in the premises as may be just.

Dated, New York, December 24th, 1926.

Yours, etc.,

PETER S. CARTER,
C. C. DANIELS,
Attorneys for Appellant.

To:

THE ATTORNEY GENERAL OF THE UNITED STATES,
Washington, D. C.